92-621

No._____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

DONALD NEAL RAKE, LINDA JEAN RAKE,
EARNEST WILLIAM YELL,
AND MARY KATHRYN YELL,

Petitioners,

v.

WILLIAM J. WADE, TRUSTEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Harvey C. Carpenter
David A. Carpenter *
J. Edwin Poston
CARPENTER & CARPENTER
4157 South Harvard, Suite 125
Tulsa, OK 74135
(918) 749-0050

**Counsel of Record*
Attorneys for Petitioners

October 2, 1992

QUESTIONS PRESENTED

I. Did the Tenth Circuit Court of Appeals erroneously interpret this Court's opinion in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), so as to require debtors under Chapter 13 of the United States Bankruptcy Code (title 11, United States Code) to pay interest on arrearages and other charges incident to curing a default with respect to an over-secured claim which is secured solely by a mortgage on real property which constitutes the principal residence of such debtors?

II. Did the Tenth circuit Court of Appeals create or contribute to an inter-circuit conflict by (mis)reading this Court's decision in *United States v. Ron Pair Enterprises, Inc.*, *supra*, as requiring a debtor under Chapter 13 of the U.S. Bankruptcy Code to pay interest on pre-petition arrearages and other charges in order to effect a cure of default, as provided in 11 U.S.C. § 1322(b)(5), in those instances in which the claim in default is both over-secured and secured only by real property constituting the principal residence of the debtor, while other circuits have correctly held that such interest is not required, and in fact would violate the provisions of 11 U.S.C. § 1322(b)(2) which prohibits a chapter 13 plan from modifying the rights of holders of claims which are secured solely security interests in real property which constitutes the principal residence of the debtor?

LIST OF PARTIES

In addition to the names of the parties to the proceeding appearing in the caption of the case, Ronnie Hannon and Rosetta Hannon were parties before the United States Bankruptcy Court for the Northern District of Oklahoma and to the consolidated appeals before the United States District Court for the Northern District of Oklahoma and the United States Court of Appeals for the Tenth Circuit.

RULE 29.1 STATEMENT

As required by Rule 29.1 of this Court, Petitioners aver that there are no parent or subsidiary companies to be listed herein.

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*No.*_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

DONALD NEAL RAKE, LINDA JEAN RAKE,
EARNEST WILLIAM YELL,
AND MARY KATHRYN YELL,

Petitioners,

v.

WILLIAM J. WADE, TRUSTEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Donald Neal Rake, Linda Jean Rake, Earnest William Yell and Mary Kathryn Yell ("Petitioners") ask this Court for a writ of Certiorari to review the July 1, 1992 decision of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's opinion below is officially published at 968 F.2d 1036 (10th Cir. 1992). A - 26.[1] In that opinion, the Tenth Circuit reversed a consolidated order of the United States District Court for the Northern District of Oklahoma. A - 19. The District Court's consolidated order itself had affirmed three unconsolidated orders of the United States Bankruptcy Court for the Northern District of Oklahoma. A - 7, A - 13, and A - 16.

JURISDICTION

The Judgment sought to be reviewed was entered by the United States Court of Appeals for the Tenth Circuit on July 1, 1992. A - 26. There have been no requests for rehearing before the United States Court of Appeals for the Tenth Circuit, nor any orders entered granting extensions of time in which to file a petition for a writ of certiorari. The statutory provision conferring jurisdiction on this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit in question by writ of certiorari is 28 U.S.C. § 1254(1). This petition for certiorari is being filed under Rules 13.1 and 13.4 of this Court.

STATUTES IN ISSUE

This case involves the following constitutional provisions, statutes, and regulations, which are fully reprinted in the Appendix: 11 U.S.C. §§ 506, 1322, and 1325.

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[1] The Appendix to this petition is cited as "A - ___."

STATEMENT OF THE CASE

The relevant facts in each of the underlying Chapter 13 Bankruptcy proceedings, consolidated for appellate purposes, are virtually identical, as follows:

Petitioners are mortgagors of various real estate mortgages which secure the Respondent as to repayment of the Petitioners' respective promissory notes, and which were made payable to Respondent's assignor, Jim Walter Homes, Inc. Each of the debts to Respondent is secured only by a security interest in the particular real property which constitutes each such Petitioner's principal residence. Each debt to Respondent, insofar as concerned with this Petition, constitutes a claim, pursuant to the provisions of the United States Bankruptcy Code.[2]

As to each claim, the Respondent is considered to be "over-secured", as the value of the particular collateral securing each claim of Respondent exceeds the amount of each such claim.

Each petitioner was in default of the terms of his or her promissory note to Respondent as of the date of commencement of each respective chapter 13 bankruptcy proceeding. Each chapter 13 plan proposed to repay the amount of the then existing arrearage to the Respondent over the life of each such chapter 13 plan, without payment of interest, but including the contractually bargained for late payment penalties. None of the security interests or promissory notes herein concerned provided for any separate charge for interest on late payments of any regular installment due, each such note providing for a maximum

[2] Title 11, United States Code.

late payment penalty of Five Dollars ($5.00) per late payment - without regard to when such default was to be cured.

Respondent timely objected to treatment afforded his various arrearage claims in the underlying bankruptcy proceedings, and the bankruptcy court denied each of these objections. A - 7, A - 13, and A - 16.

The United States District Court for the Northern District of Oklahoma, sitting in its appellate capacity, affirmed the decisions of the bankruptcy court. A - 19.

The United States Court of Appeals for the Tenth Circuit reversed and remanded, holding that "in Chapter 13 plans an over-secured mortgagee of the debtor's personal residence is entitled to post-petition interest on arrearages and other charges even if the mortgage instruments are silent on the subject and state law would not require interest to be paid." A - 41.

The Tenth Circuit has misinterpreted this Court's holding in *United States v Ron Pair Enterprises, Inc., supra*, both in requiring interest to be paid on arrearages being cured under a chapter 13 plan, as well as requiring interest to be paid on other charges incident to curing under 11 U.S.C. § 1322(b)(5), such as attorney's fees, late payment penalties and, in an appropriate case, costs of foreclosure.

Petitioners request this Court to reverse the Tenth Circuit Opinion and resolve the inter-circuit conflict by clarifying the correct rule, that interest may not be required to be paid as an incident of cure under 11 U.S.C. § 1325(b)(5) in those instances in which the documents underlying the secured claim do not provide for the payment of such interest when curing a default.

REASONS FOR GRANTING CERTIORARI

This Court should grant Certiorari, in this case for two reasons:

(i) The Tenth Circuit Court of Appeals erroneously interpreted this Court's Opinion in *Ron Pair* by requiring chapter 13 Debtors to pay interest as an incident to the curing of defaults to the Respondent, who holds over-secured claims in each of the consolidated cases, which claims are secured solely by security interests in the respective principal residences of the debtors;

(ii) The Tenth Circuit either created an inter-circuit conflict by its decision below, or in the alternative contributed to an already existing conflict, by misreading *Ron Pair* as requiring interest to by paid by a chapter 13 debtor in order to effectuate the curing of a default to an over-secured claimant pursuant to 11 U.S.C. § 1322(b)(5), in those instances in which the claim in default is secured solely by real property constituting the principal residence of the Chapter 13 debtor.

The writ of Certiorari is thus needed to resolve the inter-circuit conflict which has widespread implications in, literally, thousands of Chapter 13 bankruptcy proceedings in which debtors are chiefly concerned with saving their homes by "de-accelerating" home mortgages in arrears, by curing defaults and continuing regular monthly payments as permitted by 11 U.S.C. § 1322(b)(5).

Further, the impact of the Tenth Circuit opinion in not limited to debtors and holders of home mortgages, but extends to all unsecured creditors in Chapter 13 cases in which dividends to holders of unsecured claims is less than 100 percent. In those instances, unsecured creditors bear the brunt of the Tenth Circuit opinion, as interest required to cure the default on a typical home mortgage under a Chapter 13 plan would, inevitably, be diverted from dividends which otherwise would be paid to holders of unsecured claims.

The perpetuation of the inter-circuit conflict which has now developed will have a widespread and disruptive impact upon bankruptcy courts nationwide, as a substantial percentage of Chapter 13 bankruptcy proceedings involve the curing of arrearages on home mortgages, and creditors, uncertain as to their rights with respect to the inter-circuit conflict, will flock to the bankruptcy courts, inundating the courts with motions to determine the necessity of payment of interest on home mortgage arrearages cured under a Chapter 13 plan. This conflict effectually destroys the Congressional purpose of uniformity in administration of the bankruptcy laws.

Only Certiorari relief from this Court can correct the erroneous ruling of the Tenth Circuit and restore uniformity among the circuits as to this vital issue now before this Court.

(I)

The Tenth Circuit Court Appeals erroneously interpreted this Court's opinion in *Ron Pair* by requiring Chapter 13 debtor's to pay interest as an incident to the curing of a default to the holder of an over-secured claim, which claim is secured solely by a security interest in a real property which constitutes the debtor's principal residence.

The Court of Appeals for the Tenth Circuit, in issuing its opinion below, overgeneralized the holding of this Court in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), as stating that every over-secured creditor is entitled to post-petition interest on every secured debt in every bankruptcy proceeding. In point of fact, however, the holding in *Ron Pair, supra*, is much more limited than the broad brush interpretation painted by the Tenth Circuit.

The holding of *Ron Pair* is limited to its peculiar facts. In that case, the United States government, through the Internal Revenue Service, maintained an involuntary tax lien on real property held by the debtor-in-possession, Ron Pair Enterprises, Inc., in the context of a Chapter 11 bankruptcy proceeding. The government was deemed over-secured as the value of the debtor-in-possession's interest over and above all other encumbrances, exceeded the amount of the tax claim. This Court correctly held that in this instance, the over-secured status of the government in a Chapter 11 context entitled the government to post-petition interest, the distinction being whether, in a Chapter 11 context, the creditor was deemed over-secured, and not whether the lien upon the property in question was of a consensual nature or not.

Ron Pair stands for the proposition that the over-secured creditor in a Chapter 11 context must be awarded post-petition interest in a Chapter 11 plan of reorganization, or such plan is subject to a valid objection by such over-secured creditor.

In the matter before this Court today, *Ron Pair* is inapplicable.

First, *Ron Pair* dealt only with the situation of an over-secured creditor in a Chapter 11 context. The overlay of the provisions of Chapter 13 of the Bankruptcy Code significantly impacts the applicability of *Ron Pair* to the case at bar.

Second, in *Ron Pair* the debtor-in-possession, being a corporation, could not have any title ownership in real property constituting a principal residence, as that phrase is used in 11 U.S.C. § 1325, as corporations, not being natural persons, cannot have places of residence.

Third, in *Ron Pair* the debtor-in-possession was not seeking to cure an arrearage or default for nonpayment of the secured debt while continuing payments, as the debtors before this Court are seeking to do.

The Tenth Circuit also misinterpreted *Ron Pair* in requiring post-petition interest to be paid on fees, costs, and other charges as provided in the agreement under which such over-secured claim arose. The specific language of 11 U.S.C. § 506(b) provides that no interest shall be allowed on such fees, costs and other charges, as this Court properly observed in *Ron Pair* at 241:

This reading is also mandated by the grammatical structure of the statute. The phrase 'interest on such claim' is set aside by commas, and separated from the referenced to fees,

costs, and charges by the conjunctive words 'and any.' As a result the phrase 'interest on such claim' stands independent of the language that follows. '[I]nterest on such claim' is not part of the list made up of 'fees, costs, or charges' nor is it joined to the following clause so that the final 'provided for under the agreement' modifies it as well. See *Best Repairco v. United States*, 789 F. 2d, at 1082. The language and punctuation Congress used cannot be read in any other way. By the plain language of the statute, the two types of recovery are distinct. (footnotes omitted)

Notwithstanding this very explicit language in *Ron Pair*, the Tenth Circuit ignored such language in holding:

> [I]n Chapter 13 plans an over-secured mortgagee of the debtor's personal residence is entitled to post-petition interest on arrearages *and other charges* even if the mortgage instruments are silent on the subject and state law would not require interest to be paid. A - 41 (emphasis added).

The Tenth Circuit is itself confused with respect to Chapter 13 matters. In the case at bar, the Tenth Circuit stated:

> [T]he cure contemplated by [11 U.S.C.] § 1322(b) in fact does modify the mortgagee's rights under the mortgage contract by (1) denying effect to acceleration clauses in mortgages -- allowing cure within a 'reasonable time'; (2) denying the mortgagees [sic] the right to foreclose; and (3) abridging the contract provisions that all payments in default are immediately due and payable.

Two years previously, the Tenth Circuit, in another opinion written by Judge Logan, *Jim Walter Homes, Inc. v. Spear*s, 894 F. 2d 1227 (10th Cir. 1990), in footnote 4 at 1228 stated:

> Section 1322(b)(2) prohibits *modification* of security interests in a mortgage on real estate that constitutes the debtors' personal residence, but § 1322(b)(3) and (5) permit *curing* of any default. All of the cases above cited [citations omitted] agree that if a residential mortgage is in default, triggering contractual acceleration of the mortgage debt, a chapter 13 plan to 'de-accelerate' by paying the amount of the original default rather than the entire accelerated debt, is a permissible cure, not a prohibited a modification. (emphasis in original.)

The Tenth Circuit Opinion in *Jim Walter Homes, Inc. v. Spears, supra*, was rendered post-*Ron Pair*, and without explanation, the Tenth Circuit asserts that curing a default now constitutes a modification of the original mortgage, whereas the same treatment did not constitute a prohibited modification in the tenth Circuit two years previously, in 1990.

It must be held in mind that the prohibition on modification of a claim in a Chapter 13 proceeding secured only by a mortgage on real estate which constitutes the debtors' principal residence, relates only to the Chapter 13 plan. That is to say, a Chapter 13 plan may not so modify a "home mortgage". There is no prohibition upon on Congress' modifying the rights of holders of such secured claims through the vehicle of the bankruptcy code. This is exactly what has happened with respect to the enactment of 11 U.S.C. § 1322(b)(2) and (5). The curing of a default within the context of Chapter 13, whether related to a "home mortgage" or any other secured claim, takes place, not as a function of the Chapter 13 plan, but by utilization of the provision permitting cure under

the Bankruptcy Code itself. The Tenth Circuit, in requiring the payment of post-petition interest on the arrearage claims before this Court, has itself done violence to 11 U.S.C. § 1322(b)(2) by requiring that the Chapter 13 plan now provide for interest on the payment of delinquent installment payments, where neither the Bankruptcy Code, nor the underlying documents creating this claim, require the payment of such interest. Further, it is not the plan which modifies the rights of holders of "home mortgages" being cured in a Chapter 13 proceeding by preventing them from pursuing state remedies, such as foreclosure, but the Bankruptcy Code itself.

(II)

The Tenth Circuit of Appeals has created or contributed to an existing inter-circuit conflict by joining the Sixth Circuit, in requiring post-petition interest to be paid on delinquent "home mortgage" installments being cured in a Chapter 13 plan pursuant to 11 U.S.C. § 1322(b)(5).

In issuing its opinion below, the Tenth Circuit joined the Sixth Circuit in requiring the post-petition interest as an element of a Chapter 13 cure of a delinquent home mortgage. The Sixth Circuit Court of Appeals, in the case of *Cardinal Federal Savings & Loan Association v. Colegrove*, 771 F. 2d 119 (6th Cir. 1985) was the first circuit to require post-petition interest as an incident to the cure of the home mortgage default under Chapter 13. This case, has not been without its critics. In the *Colegrove* decision itself, Judge Celebrezze wrote a strong dissent which has been cited with approval by numerous other jurisdictions. Further, the editor of the leading treatise on bankruptcy is also harshly critical of *Colegrove*:

As discussed above section 1322(b)(5) was intended to codify the practice under which foreclosure was enjoined during the pendency of a Chapter XIII plan under the former Bankruptcy Act, with the debtor given a reasonable amount of time to cure defaults. Since that cure occurred under non-bankruptcy law, the interest and costs to which the mortgagee was entitled were determined under applicable non-bankruptcy law. Nothing in the Code or its legislative history indicates any intent to alter those rights where a cure is effectuated under section 1322(b)(5).

... The present value tests [of 11 U.S.C. § 1325(a)] compensate creditors whose rights have been modified by reductions in payments, interest charges or the total amount due; where a default is cured, however, the creditor's rights are not modified. Since the contract terms remain in force (except for the injunction against foreclosure) the time value of money is irrelevant. The creditor receives the interest, charges, and costs to which it is entitled under the contract and applicable non-bankruptcy law. Typically, the creditor is not entitled under its contract to receive interest on previously accrued interest (compound interest) or on attorneys' fees and costs, as would result under *Colegrove* Court's decision.

Collier ¶ 1322.09[04] at 1322-23 and 1322-24.

Those jurisdictions which have denied post-petition interest upon the curing of a defaulted home mortgage under Chapter 13 are the Eleventh Circuit, in *Foster Mortgage Corp.*

v. Terry, 780 F. 2d 894 (11th Cir. 1985), the Third Circuit, in *In re: Appeal of Capps*, 836 F. 2d 773 (3rd Cir. 1987), the Fourth Circuit, in *Landmark Financial Services v. Hall*, 918 F. 2d 1150 (4th Cir. 1990) and the Ninth Circuit, in *Shearson Lehman Mortgage Corp. v. Laguna*, 944 F. 2d 542 (9th Cir. 1991). In each of these cases, the circuit courts have determined, along with the editor of Collier's, *supra* that cure within the context of 11 U.S.C. § 1322(b)(3) and (5) is effected outside the Bankruptcy Code under applicable non-bankruptcy (state) law. These courts further conclude that the legislative history of 11 U.S.C. § 1322 indicates Congress had no intent to modify prevailing practice under Chapter XIII of the previous Bankruptcy Act, which did not permit interest as an incident to a post-petition cure.

Although the Tenth Circuit pays lip service to these conflicting jurisdictions, as well as the editor of Collier's, that Court brushed past this considerable body of law, based upon what appears to be the slightest of policy considerations regarding protection of home mortgagees.

Allied against the overwhelming weight of authority at the circuit level, as well as the leading treatise on bankruptcy, stands a divided Sixth Circuit and, now, the Tenth Circuit. Since the Tenth Circuit cannot itself determine whether curing of the default in a Chapter 13 proceeding constitutes a prohibited modification or not, the uncertainty which must necessarily result from the decisions of the divided Sixth Circuit and the schizophrenic Tenth Circuit will inevitably result in substantial confusion in those circuits which have not yet passed upon this issue. Perhaps more importantly, is the impact upon holders of unsecured claims across this country in the Chapter 13 context. As there is no balloting on the appropriateness of a Chapter 13 plan by creditors, such as is the case in the Chapter 11 context, the practical impact of requiring post-petition interest to paid on

arrearages and other charges, as now required by the Tenth Circuit, rests squarely upon "backs" of holders of unsecured claims. Except in the comparatively rare circumstances in which a Chapter 13 plan proposes to pay no dividends to holders of unsecured claims or, in the alternative, 100% of all unsecured claims, the payments into a Chapter 13 plan which, under the holding of the Tenth Circuit, must be devoted to interest on home mortgage arrearages, must inevitably be diverted from dividends which would otherwise be paid to holders of unsecured claims. In most instances, it is the unsecured creditors, and not the debtors who will suffer as result of the Tenth Circuit's Opinion here. Therefore, the field of impacted parties spreads far beyond the set of debtors and home mortgagees, but extends to all unsecured creditors holding claims in Chapter 13 bankruptcy proceedings. This uncertainty can only be resolved by Court's granting Certiorari and correcting the erroneous decision of the Tenth Circuit.

RELIEF REQUESTED AND CONCLUSION

The Petitioners urge this Court to grant Certiorari to correct the Tenth Circuit's error, to clarify the extent of this Court's holding in *Ron Pair* and to resolve the existing conflict among the circuit courts. Alternatively, the Petitioners request that this Court grant this Petition for Certiorari, summarily reverse the decision of the Tenth Circuit, and reinstate the decisions of the District and Bankruptcy Courts which correctly denied post-petition interest to the Respondent. At the very least, the Petitioners ask this Court to grant Certiorari and remand this case to the Tenth Circuit with instructions to reconsider, follow the holdings of the Third, Fourth, Ninth and Eleventh Circuits, and deny post-petition interest to the Respondent.

Respectfully Submitted,

Harvey C. Carpenter
David A. Carpenter *
CARPENTER & CARPENTER
4157 South Harvard, Suite 125
Tulsa, OK 74135
(918) 749-0050

**Counsel of Record*
Attorneys for Petitioners

APPENDIX

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STATUTES AND REGULATIONS

Title 11, United States Code (1978, as amended)

§ 506. Determination of secured status.

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of the creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against a debtor that is not an allowed secured claim, such lien is void unless --

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of claim under section 501 of this title.

§ 1322. Contents of plan.

(a) The plan shall --

(1) provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; and

(3) if the plan classifies claims, provide the same treatment for each claim within a particular class.

(b) Subject to subsections (a) and (c) of this section, the plan may --

(1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated, however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other secured claims;

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

(3) provide for the curing or waiving of any default;

(4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim;

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

(6) provide for the payment of all or any part of any claim allowed under section 1305 of this title;

(7) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(8) provide for payment of all or part of a claim against the debtor from property of the estate or property of the debtor;

(9) provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity; and

(10) include any other appropriate provision not inconsistent with this title.

(c) The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years.

§ 1325. Confirmation of plan.

(a) Except as provided in subsection (b), the court shall confirm a plan if --

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan --

(A) the holder of such claim has accepted the plan;

(B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder; and

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

(b) (1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan --

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in a three year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended --

(A) for the maintenance or support of the debtor or a dependent of the debtor; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(c) After confirmation of a plan, the court may order any entity from which the debtor receives income to pay all or any part of such income to the trustee.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	**CASE NO. 91-01263-C**
RONNIE HANNON and	)	**Chapter 13**
ROSETTA HANNON,	)	
	)	
Debtors.	)	

AMENDED MEMORANDUM OPINION[1]

On April 25, 1991, the Debtors filed a petition for relief under Chapter 13 of the Bankruptcy Code. The Debtors listed their residence as an asset valued at $72,175.00 and subject to a first mortgage in favor of William J. Wade, Trustee, in the amount of $32,175.00.

The Debtors plan of repayment provided that all post-petition payments due on the mortgage would be paid direct to the Mortgagee as they became due. At the time of filing the petition for relief the Debtors were in arrears on their monthly payments in an amount of $1,513.80 and the Mortgagee had commenced foreclosure proceedings in the state court. The Debtors proposed to pay this arrearage, which they estimated to be $1,680.00, at $20.00 per month for sixty (60) months, with no interest. This was offered pursuant to Section 1322(b)(5) which provides in substance that a pre-petition default in the

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[1] This Amended Memorandum Opinion replaces the Memorandum Opinion entered herein June 25, 1991, and discussed in Court that day.

payment of a secured claim can be cured within a reasonable time (de-acceleration).

The Mortgagee objected to the confirmation of the plan because the plan did not propose to pay interest on the mortgage arrearages as follows:

Payments due:
$1,513.80

Insurance advanced:	800.00
Taxes advanced:	61.07
Late fees:	60.00
Attorney fees advanced:	750.00
Court costs advanced	100.00
Total arrearages:	3,284.00

The Mortgage provides as follows:

1. If a monthly payment was not paid within fifteen (15) days the Debtors would be charged a late payment of Five Dollars ($5.00).

2. If the Mortgagee had to advance insurance or taxes such amounts would be added to the Mortgage debt and would bear interest at the rate of Ten Percent (10%).

3. If the Mortgagee incurs attorney fees and court costs in foreclosing on the Mortgage or attempting to collect the debt, these expenses would be added to the Mortgage indebtedness.

The Debtors contend that the Mortgagee is not entitled to interest on the arrearages because it was not provided for in the Mortgage.

Conclusions of Law

The majority rule is that Mortgagees are not entitled to interest on mortgage arrearages due and owing on the Debtors' residence unless the mortgage provides for it. See In re Stamper, 84 B.R. 519 (Bkrtcy. N.D. Ill. 1988); In re Terry, 780 F.2d 894 (11th Cir. 1985); Appeal of Capps, 836 F.2d 773 (3rd Cir. 1987); Collier on Bankruptcy, Volume 5, Section 1322.09(4). Contra, In re Colegrove, 771 F.2d 119 (6th Cir. 1985); In re Thomas, 115 B.R. 305 (Bkrtcy. E.D. Okla. 1990).

This Court expressly adopts the reasoning of Judge Ginsberg in Stamper.

Pursuant to these cases, the Court will allow interest on the $861.07 owed the Mortgagee for insurance and taxes, at ten percent (10%) interest, as provided for in the mortgage. This amount is to be paid by the Trustee over the sixty month life of the Plan. The unpaid pre-petition monthly payments in the amount of $1,513.80, plus the $60.00 late fee, will be paid by the Trustee over the sixty month life of the Plan without interest. A reasonable attorney fee, as allowed by this Court after a hearing, plus the $100.00 costs, will be paid by the Trustee over the sixty month life of the Plan without interest. Interest is not allowed on the past due payments, attorney fees and court costs, because it is not provided for in the mortgage.

The Debtor will pay directly to the Mortgagee the principal amount due on the mortgage on the date of bankruptcy, in monthly installments, at the contract rate of interest, over the term of the mortgage. In determining the principal amount due on the mortgage, the arrearages discussed above are not to be included because they are being paid as indicated.

SO ORDERED.

Dated this 26 day of June, 1991.

s/ Stephen J. Covey
Stephen J. Covey
United States Bankruptcy Judge
Northern District of Oklahoma

CERTIFICATE OF MAILING

I, Kay Gizzi, hereby certify that on this 26th day of June, 1991, I mailed a true and correct copy of the attached **Amended Memorandum Opinion** to all parties listed below.

Lonnie D. Eck
1508 South Carson
Tulsa, OK 74119

Lawrence A. G. Johnson
2535 East 21st Street
Tulsa, OK 74114

Harvey C. Carpenter
Suite One
4835 South Peoria Avenue
Tulsa, OK 74105

Donald A. Flasch
5136 East 21st Street
Tulsa, OK 74114

James M. Hinds
1701 Fourth National Bank Building
Tulsa, OK 74119-4016

Bruce G. Straub
Suite 705
5310 East 31st Street
Tulsa, OK 74135

Katherine Vance
Assistant U.S. Trustee
Room 3130, U.S. Courthouse
333 West Fourth Street
Tulsa, Oklahoma 74103

s/ Kay Gizzi
Kay Gizzi
Secretary to Judge Covey

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	**Case No. 91-01433-C**
	)	**Chapter 13**
DONALD NEAL RAKE and	)	
LINDA JEAN RAKE,	)	
	)	
Debtors.	)	

ORDER

Following the reasoning of In re Ronnie Hannon and Rosetta Hannon, Case Number 91-01263-C, Chapter 13 (Bankr. N.D. Okla. 1991) which expressly adopted the reasoning of Judge Ginsburg in In re Stamper, 84 B.R. 519 (Bankr. N.D. Ill. 1988), concerning the allowance of interest on mortgage arrearages in a chapter 13 plan. Following these cases, the Court will allow interest on the $1,732.20 owed the mortgagee for insurance, at ten percent (10%) interest, as provided for in the mortgage. This amount is to be paid by the Trustee over the twenty-four (24) month life of the plan. The unpaid pre-petition monthly payments in the amount of $2,196.40, plus the $60.00 late fee, will be paid by the Trustee over the twenty-four (24) month life of the plan without interest. A reasonable attorney fee, as allowed by this Court after a hearing, will be paid by the Trustee over the twenty-four month life of the plan without interest. Interest is not allowed on the past-due payments, attorney fees and court costs, because it is not provided for in the mortgage.

The Debtor will pay directly to the mortgagee the principle amount due on the mortgage on the date of bankruptcy, in monthly installments, at the contract rate of interest, over the term of the mortgage. In determining the principle amount due on the mortgage, the arrearages discussed above are not to be included because they are being paid as indicated.

Dated this 2 day of August, 1991.

s/ Stephen J. Covey
Stephen J. Covey
United States Bankruptcy Judge
Northern District of Oklahoma

CERTIFICATE OF MAILING

I, Kay Gizzi, hereby certify that on this 2nd day of August, 1991, I mailed a true and correct copy of the attached Order to all parties listed below.

Harvey Carpenter
Suite 125
4157 South Harvard
Tulsa, OK 74135

Lawrence A. G. Johnson
2535 East 21st Street
Tulsa, OK 74114

Lonnie D. Eck
1508 South Carson
Tulsa, OK 74119

Katherine Vance
Assistant U.S. Trustee
Room 3130, U.S. Courthouse
333 West Fourth Street
Tulsa, Oklahoma 74103

s/ Kay Gizzi
Kay Gizzi
Secretary to Judge Covey

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

ERNEST WILLIAM YELL and	)	Case No. 91-01685-W
MARY KATHRYN YELL,	)	Chapter 13
	)	
Debtors.	)	

MEMORANDUM DECISION

The question before the Court is whether the plan proposed by the debtors in Chapter 13 may be confirmed when the plan does not provide for interest on arrearages.

At the time of the filing of the bankruptcy, the debtor was $866.00 in arrears on payments due under the note, secured by a first mortgage on the homestead of the debtor.

The debtors filed their Ch. 13 Plan on May 17, 1991 which provided for arrearages of $866.00 to be paid, without interest, over the term of the Plan. The creditor Wade, who holds a first mortgage on the principal residence of the debtors, objects to the Plan, because no interest is provided for in the Plan on the arrearages.

This Court adopts the recent decision of Bankruptcy Judge Stephen J. Covey, In re Ronnie and Rosetta Hannon, Memorandum Opinion date June 26, 1991, Case No. 91-012363-C (B.C. N.D. Okla. 1991) ___ B.R. ___, wherein the holders of mortgages are not entitled to interest on mortgage arrearages due and owing on the debtors' residence. Further, there has been no modification of the creditors rights, as there has been no reduction in payments, interest charges or total amount due, as the provisions of the mortgage contract remain unaltered.

The parties have agreed the creditor Ware [sic] is over-secured; that is, the value of the property securing the obligation of the creditor is in excess of amount owed. The parties further agree the creditor Wade's attorney, Mr. Johnson, has expended time of a value of $900.00 and the time was reasonably expended and the hourly rate is agreeable. Debtor does object to the allowance of any attorney fees, post-petition, as "no provision in law permits post-petition attorney fees to be granted for filing creditors claims." This court disagrees. 11 U.S.C. § 506(b) allows "over-secured creditors reasonable fees, costs and charges, if provided for in the agreement (mortgage). This mortgage contract does so provide. Limited by reasonableness, whether pre-petition or post-petition, the creditor is entitled to recover its "costs," without interest (including a court approved amount representative of the necessary reasonable attorney fees [here agreed to be $900.00]).

Accordingly, the objection to the debtors' Ch. 13 Plan by the creditor Wade on the grounds the arrearages should bear interest is denied; and the objection is granted in regard to an increase in the amount of the arrearage to include attorney fees in the sum of $900.00.

AND IT IS SO ORDERED.

Dated: August 13, 1991.

s/ Mickey D. Wilson
MICKEY D. WILSON
UNITED STATES BANKRUPTCY JUDGE

c: David A. Carpenter
Lawrence A.G. Johnson
Lonnie Eck

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM J. WADE, TRUSTEE,	)	
	)	
APPELLANT,	)	
	)	
VS.	)	
	)	
RONNIE HANNON AND ROSETTA HANNON,	)	
	)	
APPELLEES,	)	
	)	
VS.	)	
	)	
DONALD NEAL RAKE AND LINDA JEAN RAKE,	)	No. 91-C-477-E,
	)	(Consolidated)
	)	91-C-572-E, and
APPELLEES,	)	91-C-632-E
	)	
	)	
WILLIAM J. WADE, TRUSTEE,	)	
	)	
APPELLANT,	)	
	)	
VS.	)	
	)	
EARNEST WILLIAM YELL AND MARY KATHRYN YELL,	)	
	)	
APPELLEES.	)	

ORDER

The Appellees are debtors in three separate Chapter 13 bankruptcy proceedings in the United States Bankruptcy Court for the Northern District of Oklahoma. All Appellees are in arrears on payments due under their respective first mortgages to William J. Wade, Trustee ("Wade").

In each Chapter 13 Plan, the arrearages due Wade were scheduled to be paid with the contractual $5.00 penalty for each late month, but without interest on the total arrearages, although attorney fees were provided for in these plans to Wade's attorney, no interest was to be paid on the allowed secured claims for these attorney fees.

In each case the Chapter 13 Plans were confirmed by the Bankruptcy Court and no interest on arrearages or on attorney fees was awarded. Appellant appeals from the lower courts' denials of interest.

Appellant relies on In Re Thomas, 115 B.R. 305 (Bankr. E.D. Okla. 1990), In Re Latimer, 110 B.R. 968 (W.D. Okla. 1989), Hardzog v. Federal Land Bank of Wichita, 901 F.2d 858 (10th Cir. 1990), and U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989). However, the court finds these authorities unpersuasive.

The courts in In Re Thomas and In Re Latimer relied on In Re Colegrove, 771 F.2d 119 (6th Cir. 1985), in determining that interest was due on arrearages. The court in In Re Colegrove held that interest was required by § 1325(a)(5)[1] of

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[1] Title 11 of the Bankruptcy Code, § 1325(a), states in pertinent part as follows:

> (a) Except as provided in subsection (b), the court shall confirm a plan if -

Title 11 of the Bankruptcy Code, despite, the fact that the creditor's rights had not been subjected to modification pursuant

---

> (1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;
>
> (2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;
>
> (3) the plan has been proposed in good faith and not by any means forbidden by law;
>
> (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;
>
> (5) with respect to each allowed secured claim provided for by the plan -
>
> (A) the holder of such claim has accepted the plan;
>
> (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
>
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
>
> (C) the debtor surrenders the property securing such claim to such holder; and
>
> (6) the debtor will be able to make all payments under the plan and to comply with the plan.

to that provision. The majority based its conclusion on the fact that it had previously held that even unsecured creditors were entitled to interest under § 1325 in some cases under the best interests of creditors test, so it would be anomalous to deny interest to a secured creditor in a cure situation. The dissent in Colegrove pointed out that neither the present value test of § 1325(a)(5), nor the best interest of creditors test of § 1325(a)(4), applies where a default is cured pursuant to § 1322(b)(5).[2]

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[2] Title 11 of the Bankruptcy Code, § 1322(b), states in part;

> (b) Subject to subsections (a) and (c) of this section, the plan may -
>
> (1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debtor of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims
>
> (2) modify the rights of holders of secured claims, other that a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;
>
> (3) provide for the curing or waiving of any default;
>
> (4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim;
>
> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due....

Section § 1322(b)(5) merely requires that a Plan may provide for the curing of any default within a reasonable time. When a default is cured under § 1322(b)(5), a creditor's rights are not modified. The contract terms remain in force, except for the injunction against foreclosure. However, under the present values of § 1325(a), a creditor is compensated when his rights have been modified by a reduction in payments, interest charges, or the total amount due. Under § 1322(b)(5), the creditor receives the interest, charges and costs to which he is entitled under the contract and non-bankruptcy law. Usually a creditor is not entitled under its contract to receive interest on previously accrued interest or attorney's fees and costs.

The dissent in Colegrove noted that to grant interest on the default would improperly modify a contract between a creditor and a debtor, contravening section 1322(b)(2). The contracts in the appeals before this court provide that the Creditor, now Wade, is to receive as compensation for late payments no more than 5% of each delinquent installment, not to exceed $5 per installment. Therefore, if the court grants interest on delinquent amounts under the cure provisions of section 1322(b)(5), the rights of the Debtors will be modified to their detriment, since Wade is asserting a right to both late payment charges and 10% on all arrearage amounts, including the late charges.

The Supreme Court's decision in U.S. v. Ron Pair Enterprises, Inc. indicated that the holder of an over-secured claim should be allowed interest on its claim, as well as on reasonable fees, costs or charges provided for under the agreement under which such claim arose under 11 U.S.C. 506(b).[3] While § 506 applies to Chapter 13 proceedings (see 11

[3] Title 11 of the Bankruptcy Code, § 506, reads in part as follows:

U.S.C. § 103(a)), and therefore an over-secured creditor is entitled to post-petition interest on a secured claim under Chapter 13, the over-secured creditor's right to the interest is qualified by the interplay between §§ 1322(b) and 1325(a) with respect to modification and cure. Under Chapter 11, the holder of a claim which is secured must be paid a stream of payments equal to the present value of the entire secured claim as of the effective date of the confirmed Chapter 11 Plan. This provision of the Bankruptcy Code, § 1129 of Title 11, is not applicable to the "cure" provisions Section 1322(b)(5). The Chapter 11 proceeding in Ron Pair did not involve the provisions of § 1322(b)(5) of the Bankruptcy Code.

The Tenth Circuit's decision in Hardzog v. The Federal Land Bank of Wichita dealt only with the determination of interest rates in a Chapter 12 proceeding.

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall bee allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

This court finds the reasoning in Shearson Lehman Mortgage Corp. v. Laguna, 944 F.2d 542 (9th Cir. 1991), persuasive. In that case the judges concluded that an over-over-over-secured creditor is not entitled to post-petition interest on the debtor's pre-petition mortgage arrearages. The court said:

> We find the reasoning of the Third, Fourth, and Eleventh Circuits, as well as of Judge Celebrezze in his dissent [in In Re Colegrove], to be persuasive and adopt it as the rule of this Circuit. We therefore hold that the [bankruptcy appellate panel] did not err by affirming the bankruptcy court's denial of SLMC's request for post-petition interest on the debtors' pre-petition arrearages, as their repayment constituted a cure of the default and not a modification of the underlying contract. Because SLMC is not being deprived of its property, either in the form of principal or interest, since the cure merely reinstates the parties' original agreement, we find that there is no fifth amendment violation.

Congress determined the treatment to be afforded the curing of defaults in Chapter 13 proceedings in §§ 1322(b)(2) and 1322(b)(5). These sections do not alter the contract between the parties governing such matters as the interest, if any, to be paid on arrearage. Since the contracts between the parties in the appeals at issue provide that penalties for late payments are limited to 5%, not to exceed $5 per delinquent payment, any other amount of interest would be improper.

It is ordered that the Bankruptcy Court's decisions should be and hereby are affirmed.

Dated this 16th day of December, 1991.

s/ James O. Ellison
JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

WILLIAM J. WADE, TRUSTEE,	)	
	)	
Appellant,	)	
	)	
v.	)	**No. 92-5005**
	)	
RONNIE HANNON, ROSETTA HANNON, DONALD NEAL RAKE, LINDA JEAN RAKE, EARNEST WILLIAM YELL, MARY KATHRYN YELL,	)	
	)	
Appellees.	)	

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. Nos. 91-C-477-E, 91-C-572-E,
and 91-C-632-E (Consolidated))

Submitted on the briefs:

Lawrence A.G. Johnson of Johnson & Swenson, Tulsa, Oklahoma, for Appellant.

David A. Carpenter and Harvey C. Carpenter of Carpenter & Carpenter, Tulsa, Oklahoma, for Appellees.

Before LOGAN, BARRETT and EBEL, Circuit Judges.

LOGAN, Circuit Judge.

This consolidated case involves the interplay between 11 U.S.C. § 506(b) (as construed by United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989)), 11 U.S.C. § 1325(a)(5)(B), and 11 U.S.C. § 1322(b).[1] The issue before us is whether debtors under a Chapter 13 bankruptcy plan who cure a default on the mortgage of their principal residence may be required to pay interest on the arrearage to an over-secured creditor. This issue has been considered by five other circuits, which have split

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[1] After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34 (a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

four to one.[2] The issue has also divided the district and bankruptcy courts in this circuit.[3]

Section 506(b) of the Bankruptcy Code, 11 U.S.C. § 506(b), which is applicable to Chapter 13, see id. § 103(a), provides that an over-secured creditor is entitled to "interest on such claim," as well as any reasonable fees, costs, or charges provided under the agreement from which the claim arose. In Ron Pair, the Supreme Court held that an over-secured lienholder who has no agreement with the debtor -- a non-consensual secured creditor such as the government with a lien for unpaid taxes -- is entitled, under a plain reading of § 506(b), to post-petition interest on its claim.

The "cramdown" provisions of 11 U.S.C. § 1325(a)(5) provide that Chapter 13 plans must protect secured creditors' liens and give them "the value.....[that] is not less than the allowed amount of such claim.' Id. § 1325(a)(5)(B)(i) and (ii). The cramdown provisions have been construed to require the payment of post-petition interest on a secured claim to prevent economic diminution of the value of that claim. See, e.g., Memphis Bank & Trust Co. v. Whitman, 692 F. 2d 427 (6th Cir. 1982).

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2 Compare Shearson Lehman Mortgage Corp. v Laguna (In re: Laguna), 944 F. 2d 542 (9th Cir. 1991) (no interest allowed), cert. denied, 112 S. Ct. 1577 (1992); Landmark Fin. Serv. v. Hall, 918 F. 2d 1150 (4th Cir. 1990) (same); Appeal of Capps, 836 F. 2d 773 (3d Cir. 1987) (same) and Foster Mortgage Corp. v. Terry (In re: Terry), 780 F. 2d 894 (11th Cir. 1986) (same) with Cardinal Fed. Sav. & Loan Ass'n v. Colegrove (In re: Colegrove), 771 F. 2d 119 (6th Cir. 1985) (interest allowed).

3 Compare, e.g., In re: Chavez, 138 B.R. 979, 980-81 (Bankr. D.N.M. 1992) and In re: Thomas, 115 B.R. 305, 307 (Bankr. W.D. Okla. 1989) and Wade v. Hannon, No. 91-C-477-E (Consolidated) (N.D.Okla. Dec. 16, 1991), appealed herein.

On the other hand, a Chapter 13 plan may not "modify" a claim secured only by a security interest in the debtor's principal residence. 11 U.S.C. § 1322(b)(2). A following subsection, however, provides that notwithstanding that a residential mortgage claim may not be modified the plan may " provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending." Id. § 1322(b)(5).

I

In the case before us, debtors filed for protection under Chapter 13 of the Bankruptcy Code in three separate actions. They had mortgages on their principal residences that were in default. Each of these mortgages was over-secured. In each case, the debtors' Chapter 13 plan called for the debtors to make all future monthly payments of principal and interest in the amount specified in the loan documents. In addition the debtors were to cure the default by making payments over time to compensate for the missed monthly payments -- the arrearages -- and attorney's fees and default penalties owing under the respective mortgage instruments. The mortgage instruments provided for a five dollar late payment charge but did not provide for interest to be paid on arrearages or on costs and attorney's fees; the instruments provided only that these items should become due an payable immediately.[4]

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4 The mortgage instruments provided for ten percent per annum interest on any amounts the mortgages had to pay for mortgagors' defaults in the payment of insurance, taxes and assessments. This is no t discussed in the district court's opinion, but is in two of the bankruptcy court opinions, which appear to allow the interest specified in the mortgage to be collected. Since this interest i s not discussed in the briefs, we assume the district court's affirmance of the bankruptcy court's actions allowed the interest specified in the mortgage contracts to be paid.

In each case, relying on 11 U.S.C. §§ 506(b) and 1325(a)(5), the mortgagee requested interest on the arrearage, attorneys's fees and costs created by the debtors' default before cure, and in each case the bankruptcy court declined to order such interest. On appeal to the district court the cases were consolidated, and the district court affirmed, holding that § 506(b) and § 1325(a)(5) did not apply to these cases because of the provisions of 11 U.S.C. § 1322(b). Thus, under the district court's judgement, when approving a Chapter 13 plan to cure the default on an over-secured mortgage of a debtor's primary residence, the mortgagee is not to be awarded interest on arrearages or other amounts owed absent provision for such interest in the mortgage documents. This appeal followed.

We review this question of law de novo. Heins v. Ruti-Sweet-water, Inc. (In re Ruti-Sweetwater, Inc.), 836 F. 2d 1263, 1266 (10th Cir. 1988).

II

In the first circuit court decision to consider this interest-on-arrearage issue, Cardinal Fed. Sav. & Loan Ass'n v. Colegrove (In re Colegrove), 771 F. 2d 119 (6th Cir. 1985), the Sixth Circuit ruled that interest is payable, holding that "[b]y ordering that interest be paid on the arrearage, there is no modification of the loan agreement. Instead, the interest requirement is merely incidental to the 'cure,' which is excepted from the rule of section 1322(b)(2)." 771 F.2d at 122. The court relied upon the fact that secured creditors (and in one of its prior cases an unsecured creditor) received such interest under § 1325; it reasoned that it would be "anomalous" to hold that § 1322(b) was intended to prohibit allowing such interest to a mortgagee on a principal residence. Id. Denying interest would prevent the creditor from realizing the "full present value of the amount owed." Id. at 121.

Judge Celebrezze, dissenting in Colegrove, would have denied interest, 771 F. 2d at 123, and the four other circuits addressing the issue since have held that no interest is payable on arrearages and other charges paid over time in these Chapter 13 "cure" plans absent language requiring it in the underlying mortgage contract or under state law. See Shearson Lehman Mortgage Corp. v. Laguna (In re Laguna), 944 F. 2d 542 (9th Cir. 1991), cert. denied, 112 S. Ct. 1577 (1992); Landmark Fin. Serv. v. Hall, 918 F. 2d 1150 (4th Cir. 1990); Appeal of Capps, 836 F.2d 773 (3d Cir. 1987); Foster Mortgage Corp. v. Terry (In re Terry), 780 F. 2d 894 (11th Cir. 1986). We think it important to review the analysis in those opinions.

Dissenting in Colegrove, Judge Celebrezze reasoned that interest on arrearages is not part of "curing" the mortgage default unless an interest provision is in the mortgage contract; therefore allowing interest when there is no interest provision in the contract modifies the contract in contravention of § 1322(b)(2). 771 F. 2d at 123-24. Judge Celebrezze thought that Congress did not intend to place the mortgagee in a better position under Chapter 13 that it would be under the mortgage contract. He asserted that the analogies to § 506(b) and § 1325 missed the point, because the mortgagee does not have a "claim," instead it has a "security interest" governed by § 1322(b)(2) and (5). Id. at 124. He acknowledged that as "a matter of economics" interest might be necessary to permit the creditor to realize the full value of the debt. Id. at 125. But, reviewing the legislative history, Judge Celebrezze was convinced Congress intended "to treat security interests in principal residences different from all other claims." Id.

The opinion in the next circuit court case, In re Terry, acknowledged the lender's argument about the "time value of money and the loss of income to lenders if interest is not allowed on arrearages," and declared there is "simply no right or wrong"

to the argument. 780 F. 2d at 895. The Eleventh Circuit panel stated that the issue turns on the language of the Code sections and what Congress intended. The Terry court mentioned that the statute "modified" mortgage contracts, which other wise would allow the lender to declare the entire debt due, to permit curing the default and reinstatement of regular installment payments. Id. at 896. The court held § 1325 inapplicable to residential mortgages based on legislative intent of § 1322(b) "to create a special exception of § 1325(a)(5)(B)," and reasoned that to allow interest on arrearages would constitute a "modification" prohibited by § 1322(b)(2). Id. at 896-97. "In any event, the benefits for the special treatment of home mortgages which both prohibits discharge of the long term portion of the mortgage debt . . . and prevents modification except as to cure and reinstatement, and the reasons therefor militate against permitting the mortgagee to receive more cash from the debtors than is provided in the contract." Id. at 897. The court declared that lenders could protect themselves by specific provisions in their contracts.

The Third Circuit in Appeal of Capps, relying upon legislative history and analogous Code provisions, concluded that Congress intended to distinguish between "cure" and "modification." 836 F.2d at 775-76. The Capps court considered § 1325 as involving modification, because under cramdown provisions secured creditors' rights can be "'modified by reductions in payment, interest charges or the total amount due,'" id. at 776 (quoting 5 Collier on Bankruptcy ¶ 1322.09[4] (15th ed. 1986) (hereinafter Collier)), as long as the present value is maintained. The opinion acknowledged that under the cure of § 1322(b) the secured creditor's position is "adversely affected," id., because the Chapter 13 plan abrogates contract limitations on the cure period and eliminates the creditor's right to collect arrearages by foreclosure. But the Capps panel believed Congress regarded these "incidental adverse effects" as

"insignificant when compared with the adverse effects of modifications." Id. The court declared that

> [C]ure by its very nature assumes a regime where debtors reinstate defaulted debt contracts in accordance with the conditions of their contracts. Usually the terms for cure are provided in the contracts themselves; Section 1322(b)(5) preserves such arrangements with respect to long-term mortgages by ensuring that debtors will not be prevented from curing their defaults due to the intervention of bankruptcy. Section 1325(a)(5)(B)(ii) §1325(a)(5)(B)(ii) applicable in the §1322(b)(5) cure context, it would require debtors to pay interest on their arrearages, even where such payments were not provided for contractually.

Id. at 777 (footnote omitted).

Landmark Financial Services was the first post-Ron Pair decision at the circuit level. This Fourth circuit panel distinguished cure under § 1322(b) from § 1325 cramdown because a cramdown requires that the secured creditor receive the present value of its claim within the life of the plan. 918 F.2d at 1153-54. In contrast, a "cure" reinstates the pre-bankruptcy agreement of the parties; a "cure under § 1322(b)(5) is not a modification of the mortgagee's rights." Id. at 1154. The Landmark opinion stated that "[d]espite some broad language in Ron Pair," § 506(b) was inapplicable. Id. The court reasoned that § 506(b) provides the means to establish the "extent" of a creditor's secured claim. But,

> [a] mortgage cure, in a sense, occurs outside the ambit of the Code. Any charges such as late fees

> may indeed be payable by the mortgagor who elects to cure, but such charges would be mandated not by § 506(b) but, rather, because they are integral elements of the cure. . . The valuation of the claim or the collateral is simply immaterial when the original agreement is reinstated and the debtor elects to make all the payments called for by the agreement. The mortgagee receives only the interest and other charges to which it is entitled under the agreement and applicable non-bankruptcy law.

Id. at 1155 (citations omitted). The court went on to hold that if state law required interest on arrearages it would control; but the court found no convincing authority that Virginia law would provide interest when the mortgage agreement did not.

The most recent circuit court decision on the issue is from the Ninth Circuit, In re Laguna. Laguna relied heavily upon Landmark, and adopted Landmark's distinction between modification and cure. See 944 F. 2d at 544-45. Laguna also relied upon the Collier bankruptcy treatise's criticism of Colegrove. Id.

Collier's reasoning is essentially as follows:

> As discussed above, section 1322(b)(5) was intended to codify the practice under which foreclosure was enjoined during the pendency of a Chapter XIII plan under the former Bankruptcy Act, with the debtor given a reasonable amount of time to cure defaults. Since that cure occurred under non-bankruptcy law, the interest and costs to which the mortgagee was entitled were determined under applicable non-bankruptcy law.

> Nothing in the Code or its legislative history indicates any intent to alter those rights where a cure is effectuated under section 1322(b)(5).
>
> . . . .
>
> . . . The present value tests [of § 1325(a)] compensate creditors whose rights have been modified by reductions in payments, interest charges or the total amount due; where a default is cured, however, the creditor;s rights are not modified. Since the contract terms remain in force (except for the injunction against foreclosure) the time value of money is irrelevant. The creditor receives the interest, charges and costs to which it is entitled under the contract and applicable non-bankruptcy las. Typically, the creditor is not entitled under its contract to receive interest on previously accrued interest (compound interest) or on attorneys' fees and costs as would result under the Colegrove Court's decision.

Collier ¶ 1322.09[04] at 1322-23 and 1322-24.

III

We are reluctant to disagree with thirteen of the fifteen judges who have decided this issue at the circuit level, and with the writer of the principal treatise on bankruptcy law. Nevertheless, with respect, we find their reasoning incongruous and at odds with the Supreme Court's recent admonitions to us on how we are to read and construe statutes. See Patterson v. Shumate, No. 91-913, 1992 WL 127069 (U.S. June -15, 1992). There seem to be three core elements in the reasoning of the

courts that have rejected interest on arrearages that are to be paid off over time under the Chapter 13 plan: (1) cure under the auspices of the bankruptcy court does not modify the mortgagee's rights under the mortgage contracts; (2) cure occurs under the contracts themselves, outside the bankruptcy law; and (3) legislative history indicates Congress intended to treat mortgages on principal residences different from other over-secured creditor's claims. We consider these points in turn.

A

Contrary to point one, the cure contemplated by § 1322(b) in fact does modify the mortgagee's rights under the mortgage contract by (1) denying effect to acceleration clauses in mortgages--allowing curt within a "reasonable time"; (2) denying the mortgagees the right to foreclose; and (3) abridging the contract provisions that all payments in default are immediately due and payable. The opinion in In re Terry expressly acknowledged that the statute "modified" mortgage contracts, 780 F. 2d at 896, while at the same time it declared that allowing interest on arrearages would constitute a "modification" prohibited by § 1322(b)(2). 780 F. 2d at 896-97. The Capps court acknowledged that abrogating contract limitations on the cure period and prohibiting foreclosure "adversely affected" the mortgagees, 836 F. 2d at 776, but thought the changes were insignificant when compared to the adverse affects of the "modification" that would be involved in giving interest on arrearages. Id. at 777. By acknowledging that the Bankruptcy Code adversely affects the mortgagee's rights under the contract, but denying that such an application of the Code is a "modification," the cases must be using modification as a term of art. The opinions do not explain the basis for creating or defining this term of art. Furthermore, they do not explain why granting interest on arrearages is a modification

while abrogating cure periods, acceleration clauses, and foreclosure rights under a contract is not.

B

The circuits denying interest admit that under their holdings mortgages, unlike all other over-secured creditors in bankruptcy, may not receive the full economic value of their secured claims. According to this view, the mortgagees are responsible for their losses because they did not protect themselves by adding a provision in their contracts requiring interest on arrearages. These decisions indicate that the "cure" occurs under non-bankruptcy law, the contract terms remain in force, and hence the time value of the creditor's money is irrelevant.

We do not agree with this reasoning. First § 1322(b)(5) cannot contemplate merely cure under the contract; in these situations the mortgage contract is not enforced according to its own terms, but as modified by the Bankruptcy Code. These modifications alter material terms of the contractual cure, changing the very essence of the cure, including extension of time for making up defaults to whatever is "reasonable," permitting arrearages to be paid over time instead of as one lump sum, and denying the foreclosure remedy the mortgagees typically would use to recover their money quickly or as a lever in negotiating for a catch up on mortgage payments. It seems wholly unreasonable to eviscerate the contract provisions of acceleration and foreclosure and then find binding the absence of a term regarding interest on arrearages.

Second, stating that the cure is under the contract, somehow outside of bankruptcy, assumes that the mortgagee does not have a "claim" in the same sense as other secured creditors, but only a "security interest". See Coleman, 771 F.

2d at 124 (Celebrezze, J., dissenting). But § 1322(b) itself treats the mortgagee's interest as a claim; it says a Chapter 13 plan may modify rights of holders of secured "claims" except "a claim" secured only by a security interest in a debtor's principal residence. 11 U.S.C. § 1322(b)(2). Section 1322(b)(5) permits curing of defaults on "any unsecured claim or secured claim" on which the payments extend beyond the time of the Chapter 13 plan. 11 U.S.C. § 1322(b)(5) (emphasis added). Thus, the Code clearly contemplates that when a mortgagor is in default on payments on a home mortgage the mortgagee has a "claim" in bankruptcy the same as any other creditor.

We concede that the cramdown provisions of § 1325(a)(5) are distinguishable, inasmuch as they contemplate full payment during the term of the Chapter 13 plan and may involve reducing payments, interest rates, or other changes in the creditor's claim. But a plain reading of the Code requires the application of § 506. As Landmark acknowledged, § 506 determines the "extent" of an over-secured creditor's claim. 918 F. 2d at 1154. In Ron Pair the Supreme Court interpreted § 506(b) to require payment of post-petition interest on an over-secured creditor's claim even though there is no contractual right to such interest. See 489 U.S. at 241. Only by holding that Congress intended a different result for home mortgages can we escape the conclusion that the mortgagee is entitled to post-petition interest on arrearages and other charges that are to be paid off over time under a Chapter 13 plan.

C

The courts denying interest resort to legislative history to find congressional intent to treat home mortgages differently from other over-secured claims. They review legislative history and presumed congressional intent without making any express finding that the Bankruptcy Code is ambiguous on the interest

question. As a threshold matter, we do not perceive any ambiguity in the statute that permits resort to legislative history. Cf. Toibb v. Radloff, 111 S. Ct. 2197, 220 (1991). That Congress intended to permit mortgagees to preserve the equity in their homes and to restore and maintain currency on long-term home mortgage debt is apparent on the face of § 1322(b), of course. Subsection (b)(2) of § 1322 states that the rights of holders of home mortgage claims, unlike the rights of other secured claimants, may not be modified. Yet defaults on home mortgages may be cured, id. § 1322(b)(5), as defaults on claims generally can be cured, id. § 1322(b)(3). Reading these provisions together, we think the no-modification provision obviously means that the Chapter 13 plan may not reduce the amounts of the payments, the interest rates, or extend the term of the mortgage note. The cure provision on the other hand obviously relates to paying of amounts past due. Here, clearly the Code itself alters or abrogates the terms of the mortgage, and the cure is under the Chapter 13 plan rather than the mortgage instrument. That congress mandated no modifications of future payments on home mortgages in Chapter 13, we believe in no way indicates that Congress intended to deny over-secured home mortgage creditors interest for the delay in payment of the arrearages or other charges.

Even if resort to the legislative history is justified, we find no reference to interest or arrearages, or anything that would require these creditors to be treated less charitably than other over-secured creditors. Cf. Ron Pair, 489 U.S. at 243 n.6 (legislative history of Bankruptcy Code does not shed light on question of post-petition interest).

We acknowledge that members of the home mortgage lending industry could protect themselves by explicit provisions in the mortgages that anticipate the situation before us. But that does not convince us that § 506(b), as interpreted by Ron Pair,

is inapplicable; it does not convince us that these mortgage lenders had to anticipate Chapter 13 bankruptcy to be entitled to the interest that all other over-secured creditors receive in bankruptcy proceedings.

Thus, although we reason somewhat differently, we join the Sixth Circuit in holding that in Chapter 13 plans, an over-secured mortgagee of the debtor's personal residence is entitled to post-petition interest on arrearages and other charges even if the mortgage instruments are silent on the subject and state law would not require interest to be paid. We do not decide whether current market rate or some other measure is the appropriate method for determining the interest payable. That issue was not briefed in this appeal and should be addressed in the first instance by the district court.

REVERSED and REMANDED for further proceedings consistent herewith.